South Suburban

DOCKET FILE COPY DRIGINAL

Beth Ruyle

Executive Director

Mark W. Stricker President

South Suburban Mayors and Managers Association



May 29, 1996

Mr. Reed E. Hundt Chairman Federal Communications Commission Room 814 1919 M Street, NW Washington, D.C. 20554

Ms. Susan Ness Commissioner Federal Communications Commission Room 832 1919 M Street, NW Washington, D.C. 20554 Ms. Rachelle B. Chong Commissioner Federal Communications Commission Room 844 1919 M Street, NW Washington, D.C. 20554

Mr. James H. Quello Commissioner Federal Communications Commission Room 802 1919 M Street, NW Washington, D.C. 20554

Re: Redlining/Failure to Serve by OVS Provider, CS Docket 96-46

Dear Chairman Hundt and Commissioners Chong, Ness and Quello

I am very concerned about claims by potential OVS providers that they can "pick and choose" what areas to serve because this may lead to discrimination and redlining that will result in minority, low income and growing areas of our nation's municipalities from being served by an OVS provider.

I am particularly concerned about this where the OVS provider is the only land-line video provider. This may occur in a substantial number of our nation's communities, especially if cable operators are allowed to switch to becoming OVS providers. Also, the new Telecommunications Act allows telephone companies to buy out cable companies in certain situations; and the laws of economics may result in there being only one video/data/telephone provider in a given area, which could well be an OVS provider.

Thus there is a substantial risk that the Open Video System provider could be the only wired, land-line video provider in many areas. If such a monopoly OVS provider has no restraints on where and whom it serves, it is likely to discriminate against or fail to serve large segments of our population.

The area that The South Suburban Mayors and Managers Association represents, the southern suburbs of Chicago, are traditionally ignored by new telecommunications service providers in favor of the more affluent northern and western suburbs. I am very concerned that OVS companies, without the mandate to provide universal service, will neglect our area.

I urge the Commission to prevent OVS from becoming a "redlining" service where large segments of our population cannot receive it. In this regard I urge you to consider and adopt in your OVS rules recommendations such as those set forth in the May 14 letter to the cable bureau from Counsel for Michigan, Indiana and Texas Communities.

Per the Commissions ex parte rules, a copy of this letter is being provided to the Secretary for inclusion in the public record.

Sincerely,

Beth Rugle

Beth Ruyle
Executive Director

cc: Mr. Blair Levin, Chief of Staff for Chairman Hundt

Ms. Suzanne Toller, Legal Advisor to Commissioner Chong

Ms. Mary McManus, Legal Advisor to Commissioner Ness

Mr. William F. Caton, Acting Secretary

Senator Paul Simon

Senator Carol Moseley-Braun

Rep. Harris Fawell

Rep. Bobby Rush

Rep. Jesse Jackson Jr.

Rep. William Lipinski

Rep. Jerry Weller

Production

VARNUM, RIDDERING, SCHMIDT & HOWLETTUP

MHUNGHOAR COLUND AND MICHICAN 49501-0352 TONE OFFICE BOX 152 - CALAND A AREA MICHICAN 49501-0352 THE INTONE AIR MARKES - 121 - 1 5 - 146-1203

Edition Charles WILLIAMS SAFEY BY POER ARABITRANA. ACHERY ATVERN PERT L VIANIE CARL IL YEF INSE KINE IN WITT EXENC. CARLINS DOMALIEL KHOWS W DANIBLE: MOUNDER GARY P. SERVICA THE MAST CHAP THATHY CLATE KHONE MICHARAY THE PARTY AND INCOME. A TERRY MOT AN THEMAN I MULDER WHATHAGE BARRIE

BORDING TENCHASING is in a few Kar of the Na LINGLES P. ETTLES PROME A SYTUMA ALCO D SADE HENROLT L. SKIBARI THENHAS G. DENLINE. KHIN W. (MITTLE CONTRACT P. COXXX158 PRANE DI PRINTEN HYAL IX DEEMS BYCHARDA, HODGER RANGALL W. SEASEE. CESTER A. SMIT MARKE THANKS HARILYN A. LANKING THEMASIL LINTKHART SCREET E. Diamoras

DISCOSTA ENVIRANT. пеначи жокам ENCLEMENTUMENT THESA S LECTER WESTERN BLECOMON **共成時候作者。展介には、**南 LA WHENCE P. BURNS HATTHEW D. DIMMERMAN WILLIAM E REMIN JOHN PATRICE WHITE CHARLES M. DENTON PAIR M YARA JEFFREY D. SMITH H. LAWRENCE SMITH THOMAS C. CLASTON HARK L-COLUMS ICHATHAN W. ANDERSON CARL CYCETER NEXTER

CONTRACTOR ASSESSMENT KARLON S. JOHNUS STEPHEN T. APRIN XXXXX CANDLE SIGNAL HICHARLO WOOLIBHICA TIMOTHY J. YURAGA PERSON RENINCAS HARES ALLARD TRACTION & FACE E DAVID A. PHEM DONALD A LAWLESS MOCHALL SIME THE CHORDE & DAVIS MATRIENED SONT I STEVENSON IPPORTAGE DAVID & PRESTOR PERSONAL PROPERTY.

MINAMITTE DE POSSE

IMALE BANK
DE AND DE POSSE

EXTITA HOIDENA

EXTANDE I MULTIPA

MOTHE E RICLY

EXTHERNE COUNTOOL

INVEST I MARK

RICHARD D. PRISS

INVEST I MARK

MOTHER I MOTHE

VICTOR

PATRICK A. MILES, IR.

FILLY CHEMIN

EXTRICA MOTHER

EXTRICA M

TO STATE ALL ALL CONTROLS

ME STATE Y THE THAT OF THE STATE OF STATE

ALPREN, SCHUMINGSTEL, JR.,
FANTILA, TILLA

KARY C. RONNINA

KON SI, MYLSHA

KON SI, MYLS

MILLIAN IN THE STATE OF T

DECIMANT MISSENAL IN REMILLAN HUTCHING IN RESTUASION HOMOS CONDOM & BOCKER RESERVADO DECE

May I. Sun

Ms. Meredith Jones Chief Cable Services Bureau Federal Communications Commission 2033 M Street, NW Room 918 Washington, DC 20554

Da.

OVS Rulemaking - Area Served

Dear Meredith:

Thank you for taking the time to meet with representatives of the Michigan, Indiana and Texas (MIT) Communities last Friday. Your doing so is greatly appreciated.

You asked the communities to respond on the issue of whether an OVS provider has a "universal service" requirement. In summary, we believe that OVS providers are subject to federal and local restrictions on where they serve. This is necessary to prevent discrimination, redlining and "economic redlining" which would result in minority, low income and growing areas of our nation's municipalities from being served by any cable or OVS provider.

We are particularly concerned about this in the situation where the OVS provider is the <u>only</u> land line video provider, which is likely to occur in a substantial percentage of the nation's communities. This could occur, in particular, if cable operators are allowed to switch to becoming OVS providers (and is an additional reason why this should not happen).

P466 - 67 Brom: E

VARNUM, RIDDERING, SCHMIDT & HOWLETTER ATTORNEYS AT LAW

Ms. Meredita fore May 14, 1996 Page 3

Further detail explaining the preceding points is as follows.

OVS Overbuilding Not Only Scenario: Much of the discussion to date on OVS has implicitly focused on the "overbuild" situation, that is, where an OVS provider would be serving an area already served by an incumbent cable operator. Although overbuilding may occur in some instances (and it has been rare in the U.S. to date) serious concerns from allowing an OVS operator discretion on where and whom to serve arise in the more likely situation of the OVS provider being the only (i.e. - monopoly) fand-line video provider. This is discussed next

OVS the Only Pr<u>ovider</u>: The nkety squartor it many instances is that the <u>only</u> and that video provider will be an OVS provider. This could not it a number of ways:

(1) - The incumbent cable operator switches to becoming an OVS provider. This is particularly likely to occur if the cable provider provides local telephone service. As you know, having cable companies provide phone service was stressed by Vice President Gore in his recent speech to the NCTA convention; was encouraged by the 1996 Telecommunications Act; and now is starting to occur. For example, attached are the first few pages of Continental Cablevision's May 9 application to provide telephone service in those areas of Michigan where it has cable systems. This includes the state capital - Lansing - as well as numerous other cities.

It is highly likely that other cable operators in Michigan and other states will follow Continental's example such that they will be local exchange carriers and thus claim that they can switch to being OVS providers.

- (2) In many areas, the phone company can buy out the cable company as is now expressly allowed under new Section 652 of the Communications Act (added by the 1996 Act). Section 652 in general allows such buyouts in more rural areas, for all but the largest cable operator in the top 25 television markets, and for certain cable systems outside the top 100 television markets.
- (3) In the medium to longer run, the laws of economics (in particular those relating to natural monopolies) may result in there being "one wire" to many subscribers homes which provides both telephone, video and data. This could be the result of either the cable operators displacing the phone companies or vice versa. In either case, the resulting entity will be a local exchange carrier and claim that it can be an OVS provider.

Thus, either by cable operators providing telephone service today or other mechanisms the nation is likely to face large numbers of areas where the OVS operator is the only wired video provider, as opposed to the OVS provider being an overbuilder.

VARNUM, RIDDERING, SCHMIDT & HOWLETTIME

Ms. Meredith Jones May 14 1996 Page 3

Redlining/Discrimination: A monopoly OVS provider with no restraints on where and who it serves is likely to discriminate against large segments of the nation's population in the prevision of service. These groups — predominately minorities, low income groups or growth areas on the edge of municipalities — will either have no video service or distinctly interior service (as current 1960's or 70's cable systems are not upgraded, while more affluent areas are upgraded to a liber standard). The reason for the discrimination would be the desire of the OVS operator to fluors of more affluent — and thus more profitable — areas.

Examples of this could be the following:

- As you are aware in Washington, the cable company has had significant distinculties providing cable service in the Anacosta area. If it is an OVS provider and there are no constraints on where and whom it serves, Anacostia is likely to be left with distinctly inferior cable service, if any at all.
- In Detroit, Dallas, New York, Los Angeles and other major urban centers, the low income inner city areas are likely to not be served by OVS, or again receive inferior service. For example, Detroit has 62% of its population below the poverty line and has only 31% penetration on cable, less than half the national average. The figures and risks for Dallas are comparable. A current example of such redlining comes from San Francisco, where we are informed that the current operator (Viacom/TCI) does not serve certain minority/low income areas of the city (who thus have no cable service) because it claims that it is not required to do so because (according to the operator) language requiring this was not contained in its franchise to serve the city.

These illustrations show how the lack of any requirement on where and who to serve could lead to major discrimination in the provision of OVS services. The resulting harm is particularly great where OVS is the <u>only</u> wired provider.

To prevent these types of problems cable franchises typically contain a density requirement, which if met, requires the cable operator to serve all residents of the area in question. For example, a franchise might require service without any line extension charge by the cable operator wherever there are X dwelling units per mile of street (pro-rated up or down for areas of more or less than one mile).

Municipalities with denser populations typically require in their cable franchises that service be available to all residents, with service to any low density areas being more then compensated for by high density areas.

Finally municipalities have "anti-redlining" provisions in their franchises, for example as directed by Section 621(a)(3) of the 1984 Cable Act. Often such provisions predate or are more expansive in the list of invidious criteria than Section 621(a)(3).

VARNUM, RIDDERING, SCHMIDT & HOWLETTING

Ms. Meredith Jones May 14, 1996 Page 4

The problem is equally acute in growth areas and lower density areas towards the edge of urban areas where cable operators (for example) often contend that the housing density is too low for them to provide service. A good example of what could occur comes from Las Vegas, NV where the cable operator refuses to serve much of the growing suburban areas because it claims its franchise tacks any "dwelling units per mile" requirement.

This type of problem is fairly widespread towards the edges of metropolitan areas and inmore rural areas where the single biggest cable issue is not cable rates or cable channels, but the inability of subscribers to obtain cable service. Again, municipalities address this problem through density (dwelling units per mile) requirements described above.

In conclusion, there is thus a major risk that without requirements on OVS providers of where and whom they serve, that minority, inner city and growth areas of the nation's municipalities may be left without any kind of wired video service. The numbers in question could be large, e.g. 20-40% of the nation's population.

Control Right-of-Way/Compensation: One element of the compensation which a municipality receives for the use of its right-of-ways is adequate assurance that its citizens will be served and will not be discriminated against. The exact language will vary from community to community, such as the dwelling units per mile or "serve all residents" examples described above. Such provisions affirmatively prevent discrimination based on race, income level, public assistance status or housing density.

The key is that rights-of-way are owned by the public. The public, through the municipality, is constitutionally entitled to just compensation for use of the rights-of-way. Such compensation takes a variety of forms, including not only monetary compensation but requirements such as those set forth above to ensure that public rights-of-way are used to serve the public generally and to prevent their use in a discriminatory fashion. Such provisions ensure that as many residents as reasonably possible are provided service.

Note that the preceding provisions extend not just to who is provided service but are often applied to such factors as the timing of the building (or rebuilding) of a system so that an operator cannot obtain indirectly (by a 15 year build of a 10 mile system) what it could not do directly.

Municipalities thus have the authority, as a part of the just compensation they receive and to prevent discriminatory use of public property, to take analogous actions in the OVS area.

FCC Authority and Rules Needed: For the reasons set forth above, the matter of where and whom OVS operators serve is an issue this Commission must address. Casting the issue as a "universal service" issue is probably not correct because, as the Commission is aware, cable operators currently do not serve all (or nearly all) residents of the United States (in contrast to phone companies, which effectively do provide service to most U.S. residents), and OVS is likely to be more like cable than telephone. It would be very unfortunate if this Commission were to adopt rules which would have the effect, as early as the summer or fatt of this year of allowing

VARNUM, RIDDERING, SCHMIDT & HOWLETTON

Ms. Meredith Jones May 14, 1996 Page 5

cable companies to start discriminating against minorities, low income groups or lower density geographic areas as described above.

We thus believe the Commission should, at minimum, do the following in its OVS rules: First, it should set forth a minimum density requirement for service of no more than 10 dwelling units (occupied or unoccupied) per mile of street. All areas meeting this requirement (pro-rated up or down for areas more or less than one mile) would have to be wired for OVS service within two years. An OVS provider could deviate from this requirement only if it has obtained the advance concurrence of the municipality being served, and if such deviation is approved by the Commission in the certification process. Adopting a single standard would provide the OVS providers with a simple, clear test of general applicability, yet would require them to concur with local municipalities — who without question are most knowledgeable as to local conditions—in situations where deviations from this standard are warranted.

As an example, municipalities have seen variations in density and service area requirements based upon such peculiarly local factors as terrain (mountains, rivers, lakes), man made obstacles (mining areas, Federal installations), and unique variations in demographics, housing and other residential occupancy patterns.

Second, the Commission should enunciate strong rules against discrimination on invidious grounds analogous to (but more extensive than) those set forth in Section 621(A)(3) of the Cable Act and make clear that any violation of such provisions would automatically result in OVS certification being terminated and the operator becoming a cable operator. An example of such language is attached.

Third, the Commission should take strong action to prevent cable operators from "redlining" cities with large minority populations. For example, it should prevent an OVS operator from electing to serve only the Maryland suburbs but not serving Washington D.C. at all. Actions such as this are essential to see that the nation's major urban centers with substantial minority populations, such as Detroit, Newark and many others are not denied service on racial, invidious or other self-serving grounds, while nearby communities are served. Thus the Commission should require an OVS operator providing service in an area near a municipality with a significant minority or low income population to start providing service to the latter municipality within two years of its starting to provide service to the nearby community (and to provide service to all areas of the minority/low income community within four years of starting to provide service in the nearby community). Only an absolute requirement such as this will prevent OVS operators from redlining many of this nation's cities. If OVS operators wish to have the benefits of relaxed regulation they must accept the burden of strong measures against discrimination.

Municipalities would still be able to act in the certification process or pursuant to the right to obtain just compensation if the result of the preceding were inappropriate for the municipality in question

Fren lei

VARNUM, RIDDERING, SCHMIDT & HOWLETTER

Ms. Meredith Jones May 14, 1996 Page 6

OVS Unavailable to Cable: The reasons set forth above further illustrate why cable operators should not be able to "switch" to being an OVS operator. This would lead to claims on their part that the dwelling units per mile, anti-redlining or other requirements in their franchises no longer apply, with the risks of no cable service or discrimination in service described above.

<u>Conclusion</u>: Again, we appreciate your meeting with us. We believe this issue which you raised is one with serious implications and hope the preceding analysis and recommendation is helpful.

With best wishes.

Very truly yours.

VARNUM, RIDDERING, SCHMIDT & HOWLETT...

John W Pestle

JWP/nk

cc: Mr. Rick Chessen, Cable Services Bureau Mr. Gary Laden, Cable Services Bureau